Notes

Water Associations and Federal Protection Under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status†

I. Introduction

Across the United States, metropolitan areas have continued to spread outward creating a pattern of development that consumes more and more land.[1] Over the past century, the growth of U.S. cities has been characterized by suburbanization,[2] as land outside the urban core has been developed into residential properties for many who work in the city. Since World War II, it has been commonly argued that the federal government has played a large role in fueling this conversion of rural land outside metropolitan areas into suburban development.[3]

Each increase in the amount of urban land results from the conversion of rural properties, either agricultural or undeveloped. In many cases, farmers who are trapped or hurt by changing economic conditions have found speculators and residential developers to be willing buyers when their land is in the path of urban expansion.[4] As suburbanization continues, rural

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1. *See* MARION CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES: AN ECONOMIC AND GOVERNMENTAL PROCESS 35 (1971) (stating that the physical expansion of cities since 1890 has roughly paralleled the rate of population growth in urban areas); Douglas R. Porter, *Reinventing Growth Management for the 21st Century*, WM. & MARY ENVTL. L. & POL'Y REV. 705, 708 (1999) (noting that the population growth in major U.S. metropolitan areas has been considerably slower than their growth in terms of land consumption).

2. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 304 (1985) ("[S]uburbanization has been the outstanding residential characteristic of American life."). On the other hand, defining "suburb" is a difficult task. *Id.* at 3-5.

3. *See* CLAWSON, *supra* note 1, at 41-44; Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 186-88 (1997) (considering the roles of the Federal Housing Administration, the Federal Aid Highway Act, and provisions of the federal tax code in encouraging urban sprawl).

4. During the 1980s, every state lost prime farmland because of urban development. *See* Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1039 (1999) (citing a study by the American Farmland Trust covering the period from 1982 to 1992). It should not be assumed that it was the farmer who received the lion's share of the profit for the sale of the farmland. *See* CLAWSON, *supra* note 1, at 62 (noting in some cases that the "genuine operating farmer has sold out long ago to someone who bought his land in anticipation of its later development for honsing").

areas closest to the urban fringe will inevitably face the piecemeal conversion of farms and other properties,[5] as population growth allows for more intense use of land. For example, rural counties closer to metropolitan areas have experienced greater population growth and economic development than more remote rural counties.[6]

Water and sewer service, supported by centralized infrastructure, is a necessary element for the conversion of rural land into urban land that can support higher population density. The availability of sewers fueled the historic rush towards suburbanization as early federal programs supported the building of new suburban systems instead of repairing older urban sewers.[7] Today, the process of converting rural land differs across the country, and developers must pay attention to the differences in the provision of water and utility services; developers may look to either a city, special district, or private utility company for water.[8]

Against the backdrop of urban expansion, the federal government has not been entirely unconcerned with the decline of rural areas and their water systems.[9] Despite federal support for suburbia, federal support for farms has been one impediment to urban land consumption. This Note addresses one particular pro-rural policy in which the Farmers Home Administration (FmHA) makes loans to rural water associations.[10] Beginning in 1961, the program provided water-infrastructure loans to rural areas and small towns that could not obtain credit elsewhere. For some rural areas, the existence of federal lending to water associations allowed for utility financing without incorporation.

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5. RICHARD B. PEISER, PROFESSIONAL REAL ESTATE DEVELOPMENT: THE ULI GUIDE TO THE BUSINESS 48 (1992) ("Land does not become available for development in a smooth pattern. Farmers, estate owners, and other land holders often sell for reasons such as a death or retirement and not because a buyer has made an attractive offer. Consequently, land rarely becomes developable in large, continuous tracts.").

6. Population grew more rapidly during the 1970s and 1980s in rural counties close to metropolitan areas than in remote rural counties. In terms of economic strength, rural counties adjacent to metropolitan areas also performed better. GAO, RURAL DEVELOPMENT: PATCHWORK OF FEDERAL PROGRAMS NEEDS TO BE APPRAISED 20 (1994). Overall, rural poverty increased during the 1980s. *Id.* at 39.

7. JACKSON, *supra* note 2, at 131 ("[S]ewers . . . were absolutely essential to most native white American neighborhoods; they were usually paid for by public works departments rather than by developers, especially after the 1890s.... [S]uch improvements [were] financed at general taxpayer expense."). For information on federal support for suburban sewer construction, see *id.* at 191, 293, 361 n.7.

8. PEISER, *supra* note 5, at 47-48 (noting that some states, including Texas, allow for and rely heavily on special districts to finance utilities).

9. As of 1994, 689 federal programs existed to provide rural-development assistance in the areas of economic development, agriculture, natural resources, human resources, and infrastructure. GAO, *supra* note 6, at 14. Seventeen programs were designed to provide assistance to rural areas for water and wastewater facilities. GAO, RURAL DEVELOPMENT: PATCHWORK OF FEDERAL WATER AND SEWER PROGRAMS IS DIFFICULT TO USE 9 (1995).

10. *See* 7 U.S.C. § 1926 (1994); 7 C.F.R. § 1780 (2000).

Forty years after its inception, the federal loan program has taken on a more anti-urban (or anti-suburban) stance as associations that receive loans also receive federal protection from competing water providers, including other cities. This Note contends that, because of expanding interpretations by the federal judiciary, as well as changes in state administrative programs, the federal protection for rural water associations, embodied in 7 U.S.C. § 1926(b), no longer serves a useful purpose for affected rural property owners and nearby municipalities. In areas along the urban fringe where competition exists among water providers, the federal government has thrown its weight behind water associations that are often incapable of meeting the water demands of urban land development. As a result, the existence of protected rural water suppliers has retarded land development on the urban fringe, both within the confines of the rural water association and neighboring areas that are destined for higher urban uses. Part II of this Note details the legislative history of the lending program for rural water facilities; Part III reviews federal case law interpreting section 1926(b); Part IV explores the economic-development problems created by judicial expansion of section 1926(b); Part V examines the relationship between the provision of water services and urban sprawl; Part VI argues primarily for repeal of section 1926(b); Part VII concludes.

II. History of Section 1926(b) and Federal Lending for Rural Water Projects

Protecting federally indebted water suppliers, including nonprofit water associations and cooperatives, began with section 306(b) of the Consolidated Farmers Home Administration Act (Title III of the Agricultural Act of 1961).[11] Codified at 7 U.S.C. § 1926(b), the section reads as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan . . . .[12]

A literal reading of section 1926(b) suggests that a federally indebted water association is to be protected from competitors that would otherwise steal customers from its service area by including those users in its own area. Title III represented an innovative expansion of previous lending by the FmHA, as prior water-facility loans were made only to farmers.[13]

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11. Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 307 (1961).

12. *Id.* at § 306(b) (codified at 7 U.S.C. § 1926(b) (1994)).

13. An administrator for the U.S. Department of Agriculture (USDA) in favor of the Act told the House Committee on Agriculture the following:

> One of the improvements . . . would enable [FmHA] to make a loan to a group of rural residents and farmers for the development of a domestic water system even though the

Before the passage of the Act, the FmHA budget for water-facility loans had dropped significantly, and loan applications were greater than available funds.[14] Yet, whereas Congress was acutely aware of the need for more funding and new programs, the legislative history does not suggest that Congress was concerned that these new loans were threatened by municipal expansion. A Senate committee report on the Agricultural Act of 1961 described the economics behind Title III as expanding the scope of loans for water development in rural areas so that the beneficiaries would include rural residents and farmers:

> By interpretation, loans to associations cannot now be made unless a major part of the use of the facility is to be farmers. This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision [306(a)] authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines by serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision [306(b)] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.[15]

This passage from the Committee Report, often cited by courts, has been interpreted as the intent behind section 1926(b). By adding rural residents into the same water facilities needed by farmers, both could gain access to water service at a lower cost.

Many of the entities receiving FmHA loans were private water associations or special water districts[16] representing unincorporated areas.

> farmers did not utilize the major portion of the water provided through the system. This would increase the membership of many such associations now in the planning stage and thereby reduce the cost per member and increase the benefit to the community as a whole.

Agricultural Act of 1961, Title III, Consolidated Farmers Home Administration Act of 1961: Hearings on H.R. 6400 Before the House Comm. on Agric., 87th Cong. 610 (1961) (statement of Howard Bertsch, Administrator, USDA).

14. *See* 107 CONG. REC. 8122-23 (1961) (statement of Rep. B.F. Sisk); 107 CONG. REC. 14203-04 (1961) (statement of Sen. Frank E. Moss) (noting that while $3 million was budgeted for water and soil conservation loans in 1960, the FmHA had received applications for loan assistance over $14 million).

15. S. REP. NO. 87-566, at 67 (1962), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309.

16. There is no precise definition of "special water district" because some are public and others are private. These entities are quasi-governmental because they are political subdivisions created by state statutes. In 1977, nearly 1000 special water districts existed, almost all in the western states.

The loans allowed some rural areas to have water service without incorporating. But unincorporated areas with infrastructure are ripe for annexation because existing cities do not have to build infrastructure through taxation and bonds. Thus, Congress probably perceived municipal annexation as a threat to private recipients of new FmHA loans. A literal reading of section 1926(b) shows that it prohibits municipal annexation that would pry the existing customers away from the water association and into the annexing city's water system.[17]

While the intent behind the passage of section 1926(b) seems apparent, congressional intent surrounding the scope of section 1926(b)'s protection is much less clear. Neither the water service "provided or made available" nor the "area served" by a water association can be annexed or otherwise curtailed, yet 7 U.S.C. § 1926 does not define these terms. The scant amount of legislative history does not provide any clues to what exactly was protected by statute should a municipality include unserved areas close to the facilities of the indebted association. Whatever the meaning of "service provided or made available" or "area served," the consistent use of the past participle implies that it is the existing customers of the association that are off-limits to competing municipalities. This interpretation is consistent with the idea that lending authorized by 7 U.S.C. § 1926 is to fund specific projects instead of associations—a distinction that is supported by the previous citations from the legislative record. But this distinction would eventually be lost by the judiciary.[18]

Although federal protection for water associations allowed rural communities to get access to water without incorporating—otherwise the protection from other municipalities would not be necessary—the vagueness of the scope of section 1926(b)'s protection implies that the legislation did not create federal water districts or service areas for the loan recipients. Unlike cities, whose areas of water service are readily definable and normally equivalent to their corporate limits, water associations can rely only on an operative definition of their service area based on their existing customers and facilities. Without a federal geographical construct behind section 1926(b), the claim that an indebted association could extend its

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John D. Leshy, *Special Water Districts—The Historical Background*, *in* SPECIAL WATER DISTRICTS: CHALLENGE FOR THE FUTURE 11, 11-13 (James N. Corbridge, Jr., ed., 1983).

17. A second reading of § 1926(b) is that a federally indebted municipality cannot discriminate against existing customers who receive service outside the city boundaries. *See* Wayne v. Village of Sebring, 36 F.3d 517, 527-28 (6th Cir. 1994) (interpreting § 1926(b) to apply to the indebted association itself and prohibiting curtailment by any association of its own service area). Under the facts of the case, the defendant municipality could not make water service available to customers in the extraterritorial jurisdiction conditional upon annexation. The court held that the rural community to be served included more than the residents of the indebted municipality and that the municipality must include those customers as part of the service area. *Id.* at 528.

18. *See infra* text accompanying notes 77-82.

federal protection beyond its actual or operative service area has no support in the legislative history.

After forty years, the text of section 1926(b) remains unchanged. In 1994, the FmHA was reorganized, and the loan and grant programs for water and waste disposal were transferred to the Rural Utility Service (RUS), an agency under the U.S. Department of Agriculture.[19] During the four-year period between 1992 and 1996, RUS made 4764 loans worth over $3.4 billion, with approximately 80% of the loans going to public entities and the remainder going to nonprofit associations.[20] As a result of RUS lending, 7742 entities are currently indebted to RUS and retain the protection of section 1926(b).[21] RUS-guaranteed loans for fiscal year 2001 are set for $75 million with funds going to every state.[22] The program remains underfunded, and RUS uses a scoring system to award the best loan applications.[23] With federal loans, the selected projects can go forward with the assurance of federal protection for the term of the loan—up to forty years.[24] However, as Part III explains, the scope of section 1926(b) protection has been transformed through judicial interpretation.

III. Judicial Expansion of Section 1926(b)

Federal court decisions interpreting section 1926(b) have expanded the scope of federal protection beyond annexation to other municipal actions that have been detrimental to water associations. The litigation over section 1926(b) can be divided into two categories: (1) controversies regarding what municipalities cannot do toward a protected association, and (2) controversies regarding which areas served by the association are protected. The first category of cases defines which municipal actions have "curtailed or limited . . . the [service] area"[25] of an indebted water association. The second category of cases defines where the indebted association has "provided or made [service] available."[26] Once the judiciary defines the area where water service is available, it becomes untouchable by competitors.

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19. *See* Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, 108 Stat. 3178 (1994); *see also* 7 C.F.R. § 1780.3(a) (2000) (defining Rural Utility Service).

20. GAO, RURAL DEVELOPMENT: FINANCIAL CONDITION OF THE RURAL UTILITIES SERVICE'S LOAN PORTFOLIO 2-3 (1997).

21. E-mail from Raymond McCracken, Loan Specialist, U.S. Department of Agriculture, Rural Utility Service, to author (Aug. 28, 2001) (on file with the Texas Law Review). Indebted entities include not-for-profit corporations, municipalities, counties, special-purpose districts, and Indian tribes. *Id.*

22. The information on loans and grant allocations by RUS for fiscal year 2001 was reported by the National Rural Water Association. *See* http://www.ruralwater.org/RUS2001.doc (last visited Oct. 12, 2001) (copy on file with the Texas Law Review).

23. *See infra* text accompanying notes 187-89.

24. *See infra* note 107.

25. 7 U.S.C. § 1926(b) (1994). For the full language, see *supra* text accompanying note 12.

26. *Id.*

The second category of cases is more contentious because the service areas of rural water associations are harder to define; their boundaries are less certain than municipal boundaries.

A. *Judicial Interpretation of Municipal Actions Violating Section 1926(b): Beyond Annexation*

Within the first category of cases, *City of Madison v. Bear Creek Water Ass'n*[27] involved the municipal annexation of properties served by Bear Creek Water Association and the subsequent attempt to condemn Bear Creek's facilities within the Madison city limits. Madison had originally given its approval to Bear Creek to obtain state approval to operate a rural utility within a mile of the city limits. In 1985, Madison annexed properties within Bear Creek's territory under its certificate of public convenience and necessity (CCN). At that time, Madison also instituted proceedings to condemn the facilities inside the city limits so that Bear Creek would lose 40% of its customers and 60% of its total facilities. The Fifth Circuit affirmed the summary judgment against Madison, stating that section 1926(b) "unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion."[28]

The court reviewed the legislative history and determined two purposes behind section 1926(b): (1) to encourage rural water development by expanding the number of users to decrease costs, and (2) to safeguard the financial security of the associations and their loans by protecting them from the expansion of nearby towns.[29] The court determined that a bright-line rule to prohibit all condemnation during the term of the FmHA loan would prevent municipalities from "skim[ming] the cream" by condemning those portions of a water association with the highest population density, leaving the association and its remaining customers in a weaker position.[30] In a similar case from Mississippi, the Northern District held that any impairment of a water association's ability to repay its loans was sufficient to win summary judgment against a municipal defendant.[31] But annexation was no longer considered to be an impairment despite the language of section 1926(b). These cases suggest that the monopoly control of the water association is defined and organized by its customers, not by political jurisdiction.

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27. 816 F.2d 1057 (5th Cir. 1986).

28. *Id.* at 1059.

29. *Id.* at 1060.

30. *Id.*

31. Moore Bayou Water Ass'n v. Town of Jonestown, 628 F. Supp. 1367, 1369-70 (N.D. Miss. 1986) (rejecting the need to find significant impairment by the municipality because erosion could occur piecemeal through several impairments).

Protection under section 1926(b) has also been used to prevent the sale of water from a municipality to a former client of a protected water supplier. In *Jennings Water, Inc. v. City of North Vernon*,[32] a utility had severed its contract to purchase water from Jennings, a federally indebted water association, after Jennings increased its rates. The utility turned to a nearby municipality, North Vernon, and signed a new deal to establish a connection to the City's water system.[33] The Seventh Circuit affirmed the ruling of the District Court that the loss of the utility, Jennings's largest client, would impair Jennings's ability to repay its loans and, therefore, North Vernon could not sign a water contract with the utility. After reviewing the holdings from previous decisions, the court determined that section 1926(b) "should be given a liberal interpretation."[34] The court also rejected the argument by North Vernon that Jennings was equitably estopped from claiming protection under section 1926(b) because Jennings had adequate legal notice of the construction of the new connecting line between the utility and the City. The use of estoppel was deemed inappropriate for section 1926(b) cases because the statute was enacted as an alternative to private litigation to protect the public interest (the actual rural water users).[35] As a consequence, consumers or users of water provided by a federally indebted water supplier cannot leave the supplier because using any new supplier would violate section 1926(b).[36]

The prohibition of outside water service, including supplementary service to consumers with increasing water needs, suggests that private water suppliers protected by section 1926(b) have achieved monopoly status within their service areas. Monopoly status appears appropriate when the federal loans are issued for water facilities that serve properties specifically identified by the loan application.[37] But the second group of cases has

32. 895 F.2d 311 (7th Cir. 1989).

33. *Id.* at 313.

34. *Id.* at 315.

35. *Id.* at 316-18.

36. In a recent case, the ruling from *Jennings* was extended further when a city could not sign an agreement for additional water from another supplier—a municipality. The plaintiff was a supplier protected by § 1926(b). *See* Adams County Reg'l Water Dist. v. Village of Manchester, 226 F.3d 513 (6th Cir. 2000). The original contract between the plaintiff and the defendant established minimum and maximum water purchases. But temporary water shortages had resulted in a 10-month tap ban when the defendant city could not set up new service. The Sixth Circuit reversed the ruling that had allowed the supplemental agreement as long as the defendant city maintained its contractual obligations with the plaintiff because "the minimum and maximum terms of the contract are irrelevant for purposes of finding a violation of § 1926(b)." *Id.* at 520 (referring to Jennings Water, Inc. v. City of North Vernon, 682 F. Supp. 421, 424 (S.D. Ind. 1988)).

37. During the application process, an applicant water association will provide a preliminary engineering report that details the location of proposed water lines for the project. Also, in some circumstances, an applicant will need to obtain service agreements from property owners who will receive service from the project. The USDA will use this information in reviewing applications for

expanded the protected area of indebted associations to land that was unserved by the original project.

B. Judicial Interpretation of Protected Service Areas

The first section 1926(b) cases addressed which municipal actions constituted curtailment or limiting of the protected association's service when existing customers of the protected supplier were lost to a municipality. Section 1926(b) prevents curtailment when the indebted water association has "'provided' or 'made [service] available'" without defining the service area of the loan recipient.[38] Today, the ability to determine the service area of any water supplier is further complicated by state statutes, which may or may not attach geographical boundaries when authorizing a utility to provide water under state regulations.[39] Many recent section 1926(b) cases revolve around properties where the water association had not yet provided service to customers in the disputed area. Instead, municipalities had served the properties despite the fact that they were arguably inside the service area of the water association. Consequently, plaintiff water associations went to court to stop municipalities from serving those properties in which the plaintiff claimed it had already made service available under section 1926(b).

In *North Shelby Water Co. v. Shelbyville Municipal Water & Sewer Committee*,[40] a magistrate from the Eastern District of Kentucky ruled that the defendant, a municipal utility, had violated section 1926(b) by serving properties when the indebted association had built nearby water lines. The disputed properties were carved from farms that had originally been customers of the plaintiff supplier, North Shelby, before the farms had been subdivided into residential lots. The developers desired and received municipal water service because of the greater water capacity that local regulations required for the installation of fire hydrants.[41] The court found that neither provider had exclusive rights to the properties in question because of the ambiguity of Kentucky law regarding the definition of service areas. Instead, the court found that the preexisting water distribution lines constituted "available service" and that the new subdivisions could reasonably use North Shelby for water. Under Kentucky law, North Shelby was required to make reasonable extensions or service-line connections to

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feasibility. Telephone Interview with Johnny Smith, Community Specialist, USDA Rural Development (Feb. 15, 2001).

38. Lexington-S. Elkhorn Water Dist. v. City of Wilmore, 93 F.3d 230, 235 (6th Cir. 1996).

39. *Compare* MISS. CODE ANN. §§ 77-3-1 to 77-3-15 (2000) (creating Certificates of Public Convenience and Necessity (CCN) that are issued by the Public Service Commission to a water supplier to serve properties within a prescribed geographical boundary), *with* KY. REV. STAT. ANN. §§ 278.010-.020 (Michie 1989 & Supp. 2001) (creating CCNs for public utilities, but limiting the right to serve certified territory for electric utilities only).

40. 803 F. Supp. 15 (E.D. Ky. 1992).

41. *Id.* at 20.

serve any customer,[42] and because of this requirement, service had been available to the properties in dispute before the construction of the municipal lines. The new subdivisions and their residential water users were not customers of North Shelby, but the association successfully proved that the municipality had prospectively curtailed its water service. The addition of the subdivisions would have increased the association's revenue, thereby reducing the per-user costs and increasing the security of the FmHA loan; thus, the City had violated section 1926(b) by serving those subdivisions.[43] The holding of *North Shelby* affirms that indebted suppliers are even entitled to the protection of properties currently unserved. Furthermore, courts can look to state law for guidance to determine when a protected supplier is deemed to have made service available to a disputed property.

Whereas *North Shelby* addresses the statutory duty of a district to serve properties along its existing water lines, the Fifth Circuit reached a similar conclusion regarding section 1926(b) and the legal duty of a water association to serve all properties within its district. In *North Alamo Water Supply Corp. v. City of San Juan*,[44] the court held per curiam that the "Utility's state law duty to provide service is the legal equivalent to the Utility's 'making service available' under § 1926(b)."[45] Therefore, a protected water association is insulated from state administrative actions that could potentially curtail its service area. Under Texas law, North Alamo had an exclusive right to serve the area as described by its CCN and was obligated to serve "every customer within its certified area and . . . render continuous and adequate service . . . ."[46] The court did not provide any analysis for its "legal" holding and cited to only one Tenth Circuit case for authority that state service requirements are sufficient to form the area of protection under section 1926(b).[47] Additionally, the Fifth Circuit affirmed the findings of the district court that, as a factual matter, North Alamo had

42. *Id.* at 22. *See* KY. REV. STAT. § 278.280(3) (Michie 1989) (compelling utilities to grant "reasonable extension[s]" to groups petitioning the state public service commission for such an extension).

43. *N. Shelby*, 803 F. Supp. at 22.

44. 90 F.3d 910, 916 (5th Cir. 1996).

45. *Id.*

46. *Id.* (citing TEX. WATER CODE ANN. § 13.250(a) (Vernon 2000)). According to an amendment passed in 1989, water supply corporations are required to obtain a certificate before providing retail service. *See* TEX. WATER CODE ANN. § 13.242(a) (Vernon 2000) (requiring a certificate from the Texas Natural Resources Conservation Commission (TNRCC) before any provider can supply water service to the public).

47. *N. Alamo*, 90 F.3d at 916 n.18 (citing Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir. 1988)). However, a subsequent case from the Tenth Circuit disputed that finding. Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1202 (10th Cir. 1999) ("*Glenpool* did not expressly hold that Oklahoma water districts have a legal duty to provide service; it merely referred to a specific water district's 'responsibilities to applicants within its territory' in affirming a factual finding by the district court.").

made service available through its service to subdivisions adjacent to the disputed areas and that its existing lines and facilities were adequate.[48]

The District Court enjoined the City from providing water in the disputed area and pursuing applications to decertify North Alamo's CCN in those disputed areas.[49] Before the litigation, the City of San Juan had received permission from North Alamo to serve other subdivisions that were outside the city limits and inside the certificated area of North Alamo. But the City did not receive a release from North Alamo for the five subdivisions involved in the litigation. Once the plaintiff filed in court, the City filed applications with the TNRCC to decertify the area of North Alamo that the City served. On appeal, the City argued that the district court had improperly enjoined the City from pursuing the application because the injunction interfered with the State of Texas's regulatory powers to issue or change CCNs. The Fifth Circuit rejected the argument as moot because TNRCC had issued an order consistent with the state law regarding the exclusive right of the CCN holder.[50]

The judicial orders affirmed in *North Alamo* create two serious legal problems. First, section 1926(b) now trumps state administrative functions in Texas, despite the fact that it was the exercise of Texas law that rendered the protection of section 1926(b) concurrent with the boundary of a provider's state-designated service area. Under Texas's CCN legislation, TNRCC retains the power over all CCN holders to revoke or amend their certificates,[51] a power that no longer applies to protected suppliers. Thus, under the "legal" holding of *North Alamo*, once a water utility's protection is concurrent with its legal duty to serve, a state becomes powerless to change the situation.[52] Second, Texas cities may also be deprived of the chance to

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48. *N. Alamo*, 90 F.3d at 916 (affirming the holding of the district court that the city had violated § 1926(b)).

49. *Id.* at 914. The City of San Juan was simultaneously applying to modify its own CCN to include the properties to be removed from North Alamo's CCN and the other subdivisions served by the City where North Alamo had consented to San Juan's service.

50. *Id.* at 919.

51. *See* 30 TEX. ADMIN. CODE § 291.113(a) (2001) ("A certificate ... does not become a vested right and [TNRCC] at any time after notice and hearing may revoke or amend any certificate ....").

52. The fact that federal courts have used § 1926(b) to eliminate the possibility of state administrative review of state-issued entitlements generates serious concern about federalism and the Tenth Amendment. In *North Alamo*, the Fifth Circuit did not consider the defendants' Tenth Amendment argument because the issue had not been raised at trial. *N. Alamo*, 90 F.3d at 916 (finding no extraordinary circumstances to justify hearing the argument). However, one amicus brief argued that it was the district court order preventing cities from applying for TNRCC review that inhibited TNRCC enforcement efforts and, therefore, diminished state sovereignty. Brief of Amicus Curiae Texas Municipal League at 11-12, N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996) (No. 95-40048).

The state sovereignty argument deserves fresh consideration because other decisions found no violation when a municipality's authority to annex or condemn had to succumb to § 1926(b), which

oppose protected water providers before TNRCC in administrative adjudications.[53] The court in *North Alamo* ignored a ruling from the Southern District of Ohio holding that the institution of administrative proceedings against an indebted association alone does not violate section 1926(b).[54]

Finally, the creation of an uncontestable right to serve all properties in a service area based on the combination of section 1926(b) and the state statutory legal duty to serve is problematic because water suppliers already possess a duty to serve that has been ignored in prior cases. First, all recipients of the water-facility loans are subject to an attached federal requirement to serve "any potential user within the service area who desires service and can be feasibly and legally served."[55] However, federal courts have rejected the contention that the federal requirement to serve renders the service area untouchable under section 1926(b).[56] Second, private water providers continue to have a common-law duty[57]—a duty considered to be greater than the duty of municipalities—to provide water to residents of a community.[58] Like the federal duty on loan recipients, the common-law duty

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was characterized as a policy based on Congress's power under the spending clause. City of Madison v. Bear Creek Water Ass'n, 816 F.2d 1057, 1061 (5th Cir. 1987), *accord* City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81, 96 (Colo. 1995). State interests in condemnation may be subordinate to the federal government, but state interests in their own provisions guaranteeing adequate and safe water may not be pirated by federal protection of indebted water associations. *Cf.* New York v. United States, 505 U.S. 144, 187-88 (1992) (finding that states cannot be compelled to administer a federal regulatory program).

53. A dispute between the City of Huntsville and the Walker County Rural Water Supply Corp. illustrates this point. When the WSC tried to obtain exclusive water rights from TNRCC for a large tract of land near the City's water treatment plant, the City attempted to file an objection with TNRCC. The WSC filed suit in federal court to enjoin the City of Huntsville from participating in the hearing before TNRCC. Letter from Scott Bounds, City Attorney, City of Huntsville, to Monte Akers, Direetor of Legal Services, Texas Municipal League (July 28, 1997) (on file with the Texas Law Review); Kriss Wyble, *Walker County WSC Takes On the City of Huntsville*, TEX. RURAL WATER ASS'N MAG., July 1996, at 4, 5. The dispute was resolved before trial, and the parties agreed to service areas for each entity. Letter from Paul Isham, City Attorney, City of Huntsville, to Monte Akers, Director of Legal Services, Texas Municipal League (June 12, 2000) (on file with the Texas Law Review).

54. Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 916 F. Supp. 692, 699-700 (S.D. Ohio 1995).

55. 7 C.F.R. § 1780.11(a) (2000).

56. *See* Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1203 n.9 (10th Cir. 1999) ("Because all FmHA loan recipients are subject to this federal duty, however, we do not think that the 'made service available' requirement should turn on this duty."). The federal duty does apply to an indebted municipality towards its customers outside the city limits. *See supra* note 17.

57. Lukrawka v. Spring Valley Water Co., 146 P. 640, 645-46 (Cal. 1915) (holding that the acceptance of a state franchise by a water company entailed a continuing public duty to provide water adequate to meet the needs of the municipality as it grows).

58. *See* Barbara A. Ramsay, Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945, 955-58 (1974) (distinguishing private utilities from government-owned utilities). *But see* Dennis J. Herman, Note, *Sometimes There's Nothing Left to Give: The*

to provide water, or any utility service, is checked by reasonableness considerations.[59] The "legal" holding of *North Alamo* should not be given credence without finding a qualitative difference between other sources of duty and the state statutory duty to make the state law a trigger for automatic federal protection. The Fifth Circuit did nothing to distinguish why the Texas CCN statute created a duty to serve that was greater than the other two sources of duty, both of which had been ignored in previous decisions.

The potential impact of *North Alamo* is considerable given that 45 states issue some type of CCN to investor-owned water companies.[60] Once the water association's service area under state law is legally the same as the "made available" provision of section 1926(b), *North Alamo* holds that "the service area of a federally indebted water association is sacrosanct."[61] The results from various parts of Texas show that the legal holding from *North Alamo* has negatively influenced economic development.[62]

C. *Reaction to* North Alamo *and Other Interpretations of Section 1926(b)'s Service "Made Available" Requirement Outside the Fifth Circuit*

Other federal courts have yet to decide section 1926(b) cases solely upon the "legal" holding from *North Alamo*, although water districts claiming protection continue to win the majority of cases. The Eighth Circuit found that a plaintiff had "made service available" according to section 1926(b) when it had the physical ability to serve an area and the legal right to serve an area under Iowa law.[63] The Tenth Circuit, after finding that an

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Justification for Denying Water Service to New Consumers to Control Growth, 44 STAN. L. REV. 429, 439 (1992) (contending that the statutory differences in California between public and private suppliers do not support the distinction).

59. *See* Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1252-53 (1998) ("[T]he basic modern rule ... generally accepted by all fifty states is that a utility can be required ... to make all reasonable additions .... 'Reasonable' extensions are those for which the economic cost to provide service is not disproportionate to the overall expected return to the utility in accommodating the new customer."). Rossi contends that the common-law duty to extend service has been dormant because the judiciary currently relies on statutes and decisions from public-utility commissions to decide cases regarding the extension of utilities. *Id.* at 1257-58. The duty involved here is limited to utilities. A voluntary nonprofit corporation providing water to its members is not a utility; therefore, it is not obligated to supply to others. Lockwood Water Users Ass'n v. Anderson, 542 P.2d 1217, 1220-21 (Mont. 1975).

60. E-mail from Jan Beecher, Beecher Policy Research, Inc., to author (Feb. 2, 2001) (on file with the Texas Law Review). The states without such laws are Minnesota, Michigan, North Dakota, South Dakota, and Georgia. Not surprisingly, no recorded § 1926(b) cases have come from any of these five states.

61. *N. Alamo*, 90 F.3d at 915.

62. *See infra* Part III.

63. Rural Water Sys. #1 v. City of Sioux Center, 202 F.3d 1035, 1037 (8th Cir. 2000). The district court had specifically concurred with *North Alamo*, but added that "a legal right and responsibility to serve an area may stand alone as fulfilling ... 1926(b), but having pipes in the ground, standing alone, does not." Rural Water Sys. No. 1 v. City of Sioux Center, 967 F. Supp.

Oklahoma law did not impose a duty on rural water districts to provide water service, rejected the argument that legal duty was sufficient under section 1926(b).[64] But the court reversed the summary judgment in favor of the defendant municipality and remanded the case so that the district court could resolve factual issues regarding whether the plaintiff district had made service available to disputed areas, noting that "evidentiary uncertainties should be resolved in favor of [the district] seeking to protect its territory . . . ."[65]

In *North Alamo*, the Fifth Circuit proclaimed that "[e]very federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment."[66] However, months after the decision in 1996, the Sixth Circuit ruled against a plaintiff water supplier in *Lexington-South Elkhorn Water District v. City of Wilmore*.[67] The plaintiff water district had not qualified for section 1926(b) protection because it did not have distribution lines "within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time [of the alleged encroachment]."[68] Unlike *North Alamo*, the plaintiff district in *Lexington-South* had not obtained a CCN from the state. Without authority, and unable to rely on nearby water distribution lines, the Sixth Circuit held that the plaintiff had not made service available under section 1926(b) and that the City had been justified in extending lines outside its municipal boundaries.[69]

Without taking advantage of state administrative functions to secure a defined geographical area and the ancillary duty to serve customers in the area, federally indebted water associations seeking protection must prove as a matter of fact that they have made service available. But if the association has provided water facilities that are inadequate, then, as a matter of fact, the association may not be deemed to have made services available under section 1926(b). In a Fourth Circuit case, *Bell Arthur Water Corp. v. Greenville Utilities Commission*,[70] the indebted water supplier and the city were competing to serve a tract targeted for industrial development near Greenville, North Carolina. Bell Arthur, a nonprofit water-services

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1483, 1526 (N.D. Iowa 1997) (citations omitted). Under the facts of the case, the plaintiff supplier was ruled not to be a district under Iowa law subject to a prohibition on providing water within two miles of a city. *Id.* at 1533.

64. Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1203 (10th Cir. 1999) (noting that a showing of legal duty would be contrary to protection against curtailments of "service provided or made available" and that using a legal-duty standard would undermine the statute's goal of encouraging water development by increasing system users).

65. *Id.* at 1206.

66. *N. Alamo*, 90 F.3d at 915 (citations omitted).

67. 93 F.3d 230 (6th Cir. 1996).

68. *Id.* at 237.

69. *Id.* at 237-38 (citing KY. REV. STAT. ANN. § 96.150(1)).

70. 173 F.3d 517 (4th Cir. 1999).

corporation, did not have a legal duty to provide water to the tract under North Carolina law, but had a six-inch pipeline running through the property.[71] Bell Arthur and the developer made an agreement for service in May 1995.[72] Although Bell Arthur was aware that the development would demand a fourteen-inch pipeline, it did nothing for months to provide greater water capacity to the tract. The developer subsequently switched service to the city utility commission, which constructed a new, twelve-inch line in October 1995.[73] On appeal before the Fourth Circuit, the court affirmed the judgment in favor of the defendant municipality, finding that Bell Arthur was not entitled to section 1926(b) protection because of its "inadequate six-inch pipe" and "unfulfilled intent" to provide the necessary service.[74] The court argued that the capability of providing service within a reasonable time was "[i]nherent in the concept of providing service or making service available."[75] Thus, the association's efforts to make service reasonably available to a prospective client may be a measure of proximity of nearby facilities and the time necessary to establish service.[76]

Although *Bell Arthur* was hailed as a victory for cities,[77] it also represented a major defeat. The district judge had determined that the plaintiff water corporation was not eligible for protection under the facts of the case because its only outstanding FmHA loan was directed toward another project one mile away from the disputed area.[78] The judge compared section 1926(b) protection to the riparian-rights principle that the right can be claimed only for that portion of the stream passing though the landowner's property.[79] Support for this position came from the federal government when an attorney representing the USDA appeared at trial and stated that the government's position was that loans servicing one area did not "qualify [the protected party] for protection from all unrelated areas."[80] The Fourth Circuit repudiated this part of the judgment as an unduly limited interpretation of section 1926(b) that would compromise the twin goals of loan repayment and reduced per-user costs through increased economies of

71. *Id.* at 526.

72. *Id.* at 521.

73. *Id.*

74. *Id.* at 526.

75. *Id.*

76. Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1213 (10th Cir. 1988) (finding the association "could and would provide water service... within a reasonable time of an application for such service."); Rural Water Dist. No. 1 v. City of Wilson, 29 F. Supp. 2d 1238, 1246 (D. Kan. 1998) (finding that the district had made service available since service could begin within three to seven working days).

77. Jeffrey Ball, *Does Rural Water Law Damp Growth of Cities?*, WALL ST. J., Oct. 15, 1997, 1997 WL-WSJ 14169923 (referring to Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 972 F. Supp. 951 (E.D.N.C. 1997)).

78. *Bell Arthur*, 972 F. Supp. at 961.

79. *Id.*

80. *Id.* at 960.

scale.[81] The Fourth Circuit also discredited the testimony of the USDA official, asserting that when the statutory language is plain, the judiciary is the final authority on statutory construction.[82]

To summarize, cases involving competition over future or prospective customers reveal a divergence of opinion among the Courts of Appeal regarding the definition of service made available by a federally indebted water association seeking protection. Much of the divergence can be attributed to differences in state laws. In those states where water districts can obtain service areas with geographical boundaries, a water district's duty to serve has been interpreted in combination with section 1926(b) to transform the district into an unassailable entity as a matter of law, regardless of the actual service delivery. Without the legal status provided by a state statute, a factual determination by the court will be necessary regarding the ability of the association to serve the properties or customers in dispute before the time the municipal defendants started service. The ability to serve based on existing, yet unused, facilities is often referred to as the "pipes-in-the-ground test."[83] None of the other circuit courts have held that the pipes-in-the-ground test should supplant the legal holding from *North Alamo.*

Still, *Bell Arthur* and *Lexington-South* represent victories for opponents of section 1926(b) because they recognize that water service as a matter of law—*North Alamo*—and the mere existence of nearby facilities—*North Shelby*—are incompatible with the reality of water development as a component of the entire land-development process. If properties have inadequate water service and the owner is unable to obtain adequate service quickly, development will move elsewhere.[84] The next part of this Note shows that the numerous victories for protected water associations have hampered regional economic development for properties along the urban fringe.

IV. Rural Water Monopolies and the Harm Posed to Regional Economic Development

The preceding case history shows that section 1926(b) has transformed indebted water associations into monopoly water providers for those

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81. Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517, 524 (4th Cir. 1999) (suggesting that if municipalities annexed the uncovered areas then the viability of the indebted association would be jeopardized, and the remaining portions would be forced to repay the loan).

82. *See id.* at 525 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). *But see* Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 916 F. Supp. 692, 701 (S.D. Ohio 1995) ("The Court found that § 1926(b) did not define pertinent terms and that it was necessary to look beyond the statutory language in order to construe the meaning thereof.").

83. *See, e.g.*, Rural Water Sys. #1 v. City of Sioux Center, 202 F.3d 1035, 1037 n.5 (8th Cir. 2000); Rural Water Dist. No. 1 v. City of Wilson, 29 F. Supp. 2d 1238, 1246 (D. Kan. 1998).

84. When companies choose new locations, their first need is land that can be developed quickly, meaning land with adequate infrastructure (including water, sewer, and storm drainage) in place. THOMAS S. LYONS & ROGER E. HAMLIN, CREATING AN ECONOMIC ACTION PLAN 23 (1991).

properties within their service areas. In one respect they are no different from municipal water utilities that act as monopolies within their incorporated boundaries.[85] But the cases also show the difficulty of defining the rural water monopoly because of the differing interpretations of just which properties have service provided or made available to them. Competition has emerged between rural systems and municipalities capable of extending their water service by annexation or by extending lines outside their boundaries because the rural water monopolies created by section 1926(b) are nebulous.[86]

With competition over service areas between growing cities and rural water systems, section 1926(b) can be a decisive factor because only municipal systems may be adequate for urban land development. Cities whose utility systems are backed by a sizable population will almost always be better able to minimize utility costs on a per-user basis.[87] More importantly, cities of any size have a set of economic tools for infrastructure improvements[88] that private water associations do not. Because the income of water associations is usually limited to revenue from customers and government financing,[89] cities will have better means to adapt to changing patterns of regional land development. The water from some rural systems may not meet minimum water-quality standards because of funding problems.[90] While both systems provide water, they differ qualitatively,

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85. *See* TEX. WATER CODE ANN. § 13.001 (Vernon 2000) (acknowledging that water utilities should be monopolies).

86. *See* Julie H. Biggs, *No Drip, No Flush, No Growth: How Cities Can Control Growth Beyond Their Boundaries by Refusing to Extend Utility Services*, 22 URB. LAW. 285 (1990). Although cities are not required to extend lines outside their boundaries, a city that does so may be construed to act as a public utility and will be forced to extend service to similarly situated properties. *See* C.C. Marvel, Annotation, *Right to Compel Municipality to Extend Its Water System*, 48 A.L.R.2d 1222, 1230 (1956).

87. *See* JOHN L. MIKESELL, FISCAL ADMINISTRATION, ANALYSIS AND APPLICATIONS FOR THE PUBLIC SECTOR 443-44 (4th ed. 1995) (noting that economies of scale exist for capital-intensive services, such as water and wastewater treatment).

88. *See* Symposium, *The Local Government Capital Improvements Financing Game: Who Plays, Who Pays, and Who Stays*, 25 URB. LAW. 479 (1993).

89. By definition, the federal loans from the Rural Utilities Service are premised on the idea that the federal government is the lender of last resort. *See* 7 C.F.R. § 1780.7(d) (2001) (requiring an applicant to demonstrate that the proposed project cannot be financed through conventional commercial lending).

90. Many rural water systems suffer from system-deterioration problems, and many cannot meet federal drinking-water standards. *See* GAO, RURAL WATER PROBLEMS: AN OVERVIEW 8-10 (1980) (stating results from an EPA study indicating that 11,300 systems do not meet standards). Today, many rural systems are disputing tightened federal water-quality regulations under the Safe Drinking Water Act. *See, e.g.*, Julie Anderson, *Cleaner and More Costly? Water Rules Bring Worries*, OMAHA WORLD-HERALD, June 26, 2000, 2000 WL 4367358 (reporting that small rural systems are concerned about the costs of compliance with water regulations, including meeting arsenic limits in drinking water, which would be passed on to consumers).

A second problem is that rural water systems have difficulty funding improvements or extensions, partially because revenue from their existing customers is not enough to cover the

because urban and suburban systems are capable of higher capacities and territorial expansion, which promote economic development.[91]

Therefore, the problems created by section 1926(b), combined with the inadequacies of some protected rural water systems, can be demonstrated in terms of local economic-development losses as properties on the urban fringe become trapped in the rural water monopoly when the market for land dictates a more intense use. The following examples of development losses originated from surveys gathered by the Texas Municipal League and the National League of Cities when municipalities were given the chance to report their experiences with water suppliers protected by section 1926(b). These examples demonstrate that section 1926(b) rural water monopolies create inefficiencies in the use of land by creating negotiation problems or by preventing development altogether to the detriment of a nearby city.

A. Rural Water Monopolies: Negotiation Dilemmas

Given the problems associated with smaller rural water systems, it is not surprising that developers prefer municipal service for industrial sites or suburban residential projects that have water demands greater than the rural systems supported by loans from the RUS.[92] As an alternative, the potential development site could be switched from the water association to the municipality under certain circumstances. A water association or water district retains the ability to transfer its water-service rights to a municipality that would provide future water service with the district's consent.[93] In this situation, the municipality is forced to purchase the right to serve the undeveloped property before the property owner will agree to develop the land. When cities pay private suppliers in exchange for the legal entitlement to provide water service to those properties, the situation is far from Coase's hypothesized ideal world of costless market transactions without externalities.[94] The negotiations between a city and a water association are

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system costs. *See id.* at 10-12 (describing water-financing problems in Danforth, Maine and Silt, Colorado).

91. For the purpose of this Note, land development is not synonymous with economic development. Economic development occurs when "more goods and services and better quality products are produced per person because of new technologies, new companies, and better trained workers." THOMAS L. DANIELS ET AL., THE SMALL TOWN PLANNING HANDBOOK 262 (2d ed. 1995). However, it is assumed that land development is one form of private investment that can contribute to greater economic productivity for a municipality. *Id.*

92. The price of water service from a small town or a private water association, although regulated, may be more expensive than service from a nearby municipality. *See* GAO, *supra* note 6, at 25 ("Because small communities do not benefit from economies of scale, they often face higher per-household costs for wastewater treatment as a percentage of household income than larger communities do."). Also, rural systems are not required to provide—and are often incapable of providing—fire protection. *See infra* text accompanying notes 130-43.

93. In Texas, such a transfer would involve the consent of the state. *See* TEX. WATER CODE ANN. § 13.251 (Vernon 2000); 30 TEX. ADMIN. CODE § 291.112 (2001).

94. If market transactions for land protected by § 1926(b) were costless or frictionless, Coase's theory suggests that developers would always successfully negotiate the purchase of such water

filled with transaction costs and are complicated by the influence of many other actors in subdivision development.[95] As a result, many Texas cities have become frustrated when dealing with water suppliers that are protected by section 1926(b) and that have their service areas already determined by their CCNs.

The experience of Sanger, Texas, as described in a letter from the Assistant City Manager, is representative of those cities dealing with a protected water provider.[96] In 2000, a developer approached the City about subdividing a 26.15 acre tract into 69 residential lots. In order to provide fire protection for the subdivision, fire hydrants were needed, but Bolivar Water Supply Corporation, the holder of the CCN, did not have adequate lines for fire hydrants. Because Bolivar was protected by section 1926(b), the City had no other option but to pay Bolivar for the right to serve the tract. The City agreed to pay $39,000, a price that did not include any facilities. After a few weeks, Bolivar decided not to release the tract unless the City paid an additional $78,000 to resolve a past dispute regarding another subdivision with 52 lots served by the city since 1986. Bolivar demanded $1500 per lot, the same amount that the City of Sanger charges as a tap fee. The City charges a tap fee to reflect its costs in establishing service, but Bolivar WSC had done almost nothing for the money. It had not built lines in the area that could support residential units less than an acre in size. Ultimately, the City paid Bolivar the entire amount.

As evidenced by the experience of Sanger, negotiating with a monopoly water supplier protected by section 1926(b) is far from balanced, and the ultimate price is not related to the value of the transferred service, but rather to how badly the municipality wants the particular development. Nor is the asking price of the water association to transfer the water service rights tied to its indebtedness.[97]

The City of Belton, located in central Texas along IH-35, has also been frustrated by a protected water supplier in its efforts to attract outside

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rights from protected associations because developers value urban land with greater productivity more than the associations value the revenue they receive from providing water to rural properties. This situation allows for a rearranging of the initial legal entitlement created by § 1926(b). *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

95. CLAWSON, *supra* note 1, at 5 ("Decision-making in the suburban land conversion process is highly diffused; there are many actors and many processes, complexly interrelated, with numerous feedbacks.").

96. Letter from Rosalie Chavez, Assistant City Manager, City of Sanger, to Monte Akers, Director of Legal Services, Texas Municipal League (Dec. 6, 2000) (on file with the Texas Law Review). Sanger, with a population of approximately 4500 persons, is located in Denton County, Texas.

97. For example, the City of Taylor, Texas, agreed to serve properties formerly served by Jonah Water Special Utility District after three years of negotiating. The final price, over $1 million, could possibly exceed the total outstanding debt of the district. Letter from Frank Salvato, City Manager, City of Taylor, to Monte Akers, Director of Legal Services, Texas Municipal League (June 19, 2000) (on file with the Texas Law Review).

economic investment in its community.[98] In 1997, the City of Belton's Economic Development Corporation purchased 190 acres to develop an industrial park on a site that had no water customers at that time. A portion of the proposed site was part of the certified area of the Dog Ridge Water Supply Corporation, which had a small three-inch water line along the boundary of the site. When approached by the City about purchasing the right to serve the tract, Dog Ridge asked for $3 million. Eventually, the two sides agreed on a $100,000 payment to transfer the CCN to the City. Two years later, a large corporation dropped its option on a 450-acre tract near Belton, partially because Dog Ridge demanded nearly $400,000 for the right to serve the site despite the fact that its facilities did not meet the state's water-pressure requirements.[99]

A different set of development problems is created when a municipality is a customer of an indebted water association and is dissatisfied with its service. As stated earlier, federal courts have favored protected suppliers, even when the city was not attempting to break an existing water contract.[100] Coolidge, Texas, a small town of approximately 800 persons in Limestone County, learned this lesson the hard way.[101] Most of the working population in Coolidge is employed by a foundry business. In 1986, the city entered into a contract with Post Oak Water Supply Corporation to purchase a minimum of 12 million gallons per year. Unfortunately, the City began to suffer water outages and water-quality problems. In order to retain the foundry business, the City wanted to obtain a second water supplier. The City obtained a grant of $500,000 to obtain a second line from a third party, Bistone Municipal Supply District. Coolidge publicized its plans and conducted public hearings on the grant and the plan to build another water line. Post Oak never objected or attempted to stop construction. After the line was completed, Post Oak sued the City seeking to enjoin it from purchasing water from any other source. At trial, the City stated that it had every intention of continuing to purchase the minimum amount as required by contract. However, due to its protection under section 1926(b), Post Oak won summary judgment in federal court to prevent the City's use of its new line.[102] On appeal, the Fifth Circuit affirmed the ruling per curiam and denied Coolidge's request to establish emergency access to water from the new pipeline, noting that section 1926(b) precludes equitable claims of

98. Letter from Jeff Holberg, City Manager, City of Belton, to Monte Akers, Director of Legal Services, Texas Municipal League (May 31, 2000) (on file with the Texas Law Review). Belton, with a population of approximately 15,000, is located in Bell County, Texas.

99. *Id.*

100. *See supra* text accompanying notes 32-36.

101. Letter from Charles D. Olson, attorney, to Monte Akers, Director of Legal Services, Texas Municipal League (May 31, 2000) (on file with the Texas Law Review).

102. Post Oak Speeial Util. Dist. v. City of Coolidge, Civil No. W-95-CA-062 (W.D. Tex. May 2, 1996).

individual defendants.[103] As a result of the ruling, a grant of $500,000 to a town of 800 persons was essentially wasted.

The negotiating behavior of protected water suppliers towards potentially competing cities also reflects their monopoly status under section 1926(b). The water supplier generally desires to perpetuate its monopoly status as long as possible. But section 1926(b) explicitly states that the protection lasts only "during the term" of the loan.[104] Thus, protected suppliers have a strong disincentive to pay back the federal government any earlier than required.[105] The plaintiff supplier in *Bell Arthur* stated that "it would have been 'madness' to forfeit valuable federal protection merely to secure a discount on its [federal] debt."[106] The current federal regulations for loans to protected entities stipulate that the repayment terms can extend up to forty years,[107] although federal officials claim to compel districts to repay the loans early.[108] One Kansas water district carried a debt of $167,412, yet asked for nearly the same amount from a municipality in exchange for its water-service rights for a single project, despite minimal investment by the district on the property.[109] Still, the federal courts have refused to scrutinize the fiscal

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103. Post Oak Special Util. Dist. v. City of Coolidge, No. 96-50204, slip op. at 9 (5th Cir. Oct. 7, 1996) (citing Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311, 316-17 (7th Cir. 1989)).

104. 7 U.S.C. § 1926(b) (1994).

105. Much of the litigation over § 1926(b) erupted over the participation of protected suppliers in the Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub. L. 99-509, § 1001, 100 Stat. 1874, 1874 (1986), which required the FmHA to sell its notes to help reduce the federal deficit. Congress amended OBRA through the Agricultural Credit Act, Pub. L. 100-233, Title VIII, § 803, 101 Stat. 1714 (1988), so that § 1926(b) would be applicable to notes sold under OBRA. Courts have differed in their interpretation of this provision and by the retention of § 1926(b) after participation in OBRA partially because some suppliers bought back their debt while others restructured their debt using a third-party lender. *See* Rural Water Sys. No. 1 v. City of Sioux Center, 967 F. Supp. 1483, 1523 (N.D. Iowa 1997); Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 42 (6th Cir. 1997) (holding that a supplier's buy back of notes extinguished the debt and the protection of § 1926(b)). *But see* City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81, 93 (Colo. 1995) (finding that the supplier had retained § 1926(b) protection because the repurchase was done with intent to reacquire the bond and resell it in the future); City of Wetumpka v. Cent. Elmore Water Auth., 703 So. 2d 907, 913 (Ala. 1997) (finding *Grand Junction* persuasive over *Scioto Water*).

106. Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 972 F. Supp. 951, 958 (E.D. N.C. 1997) (citing to plaintiff's response).

107. 7 C.F.R. § 1780.13(e) (2001) ("The loan repayment period shall not exceed the useful life of the facility, State statute or 40 years from the date of the note or bond, whichever is less.").

108. *See* Ball, *supra* note 77. Also, RUS borrowers are subject to graduation requirements when the loan is refinanced by a private commercial lender. *See* 7 C.F.R. §§ 1951.251-.300 (2001).

109. Judy Jacobs & Dave Ranney, *Cities Question Water Districts' Role: Developers and City Officials Say Water Districts Hamper Growth; Water District Officials Say They Are Protecting Their Customers*, WICHITA EAGLE, Oct. 5, 1997, at 17A (reporting that Rural Water District No. 2 asked for $705 per home for use in a proposed 200-home development with a 35% surcharge on each house's water bill to offset the district's loss of potential customers). Under Kansas law, a municipality must compensate a water district should the city provide water to areas inside the water district's boundaries. *See* KAN. STAT. ANN. § 82a-637 (1997).

behavior of indebted associations, effectively stating that any debt, no matter how small, is sufficient under section 1926(b).[110]

Part of the negotiating dilemma associated with section 1926(b) is that the differences between rural and urban/suburban water systems create a legal entitlement in the protected water supplier to decide whether a property can be developed more intensely by switching to the urban system. Rural water systems are generally incapable of servicing intense land development;[111] thus, a protected water association holds the right of the owner to develop the land with greater intensity due to its exclusive ability to negotiate for a transfer of the property to another, more capable water supplier. By analogy, this entitlement of the water association is comparable to a type of municipal zoning,[112] although private water suppliers do not have the same legal powers as cities.

The examples from Texas cities demonstrate that the monopoly power of the section 1926(b) provider allows for a type of extortion or blackmail of a neighboring city for the transfer of water-service rights and, more importantly, the ability of an owner to develop land more intensely. This is similar to the claims of "extortion" by opponents of municipal exactions.[113] As long as such rights are alienable, cities can overregulate the development process through zoning or required dedications to gain bargaining leverage to force property owners to pay for intensity rights. If strict development rules exist, the city "can sell violation rights to members of the populace for pure profit."[114] Section 1926(b), as interpreted by *North Alamo*, operates in the same way because the violation right at issue is the ability to develop land using a water system with greater capacity. Unfortunately, the situation created by section 1926(b) is currently worse than supposedly excessive municipal exactions because the entitlement held by the private supplier has no real check; it is unreviewable by the state and unenforceable through the courts.[115]

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110. City of Madison v. Bear Creek Water Ass'n, 816 F.2d 1057, 1059 (5th Cir. 1987) (affirming that one dollar of debt would be enough, because Congress "literally proscribed interference by competing facilities . . . 'during the term of said loan'").

111. *See supra* text accompanying notes 87-91.

112. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 20 (2000) ("Under the zoning regime designated by Z2, the community holds the rights to all intensive uses . . . while the landowner retains only the right to use his property for innocuous purposes.").

113. *Id.* at 13-16 (describing the context of "extortion" in *Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1987), and subsequent takings cases as part of the belief held by property-rights activists that government exactions are coercive).

114. *Id.* at 15-16. Once the judiciary has determined the scope of the regulatory power of the entity (*e.g.*, the police power of the state in "takings" cases), the use of that power to force bargaining of alienable rights is legitimate even in ridiculous cases. *Id.* at 39.

115. *See supra* text accompanying notes 49-54.

B. Rural Water Monopolies: Economic-Development Losses

When a municipality and a protected water association cannot make a deal, or if the association decides that it will not support any intense development within its service area, development is likely to locate elsewhere. Government entities fiercely compete in the economic-development arena to attract new businesses and investments into their jurisdictions.[116] On the fringe of major urban areas, where there are a myriad of different municipal and nonprofit water providers, developers choose properties based in part on the water service available.[117] All other things being equal, section 1926(b) can retard economic development when inadequate water infrastructure drives investment elsewhere.

One example is the pattern of land development near San Marcos, Texas,[118] a city of nearly 35,000 in Hays County between Austin and San Antonio. Positioned on IH-35, the city has experienced phenomenal commercial and industrial growth along the highway in the southern part of town where the City has developed appropriate water facilities.[119] However, there has been a complete absence of commercial and industrial growth in the northern part of the city.[120] Maxwell Water Supply Corporation, whose service area is located north of San Marcos, is unable to provide the type of service necessary to support such development,[121] and yet it refuses to allow the City to do so. Consequently, the City of San Marcos has been forced to turn away dozens of potential projects along the northern fringe of the city.[122]

The problem of unnecessary underdevelopment inside the service areas of protected water suppliers is not isolated to Texas. Perhaps one of the most famous examples of foreign investment projects inside the U.S. is the Mercedes-Benz automobile plant, constructed in Vance, Alabama, located fifteen miles west of Tuscaloosa. Mercedes-Benz received a generous package of economic incentives from the State of Alabama and the

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116. LYONS & HAMLIN, *supra* note 84, at 3.

117. CLAWSON, *supra* note 1, at 164 (arguing that provision of public services is influential "if not fully determinative of the location of subdivisions"). On the other hand, metropolitan areas have too many units of government for a coordinated approach to land development that would use public facilities to steer new residential development. *Id.*

118. E-mail from Mark B. Taylor, City Attorney, City of San Marcos, Texas, to Monte Akers, Director of Legal Services, Texas Municipal League (June 8, 2000) (on file with the Texas Law Review).

119. *Id.*

120. *Id.*

121. Developers must make significant system improvements (line extensions as well as pumping equipment and storage facilities) to use Maxwell's system since it "is a small, customer-owned rural water system." But developers could quickly and easily tap into the City's water system. E-mail from Mark B. Taylor, City Attorney, City of San Marcos, Texas, to author (Jan. 19, 2001) (on file with the Texas Law Review).

122. *Id.*

Tuscaloosa County Industrial Development Authority.[123] The plant is located in the service area of Citizens' Water Service, Inc., a federally indebted district protected under section 1926(b).[124] As a part of the incentive package to Mercedes-Benz, the City of Tuscaloosa agreed to run a water line to the plant to ensure service. Citizens' agreed to the Tuscaloosa line, but it barred the City from using that line to hook up additional customers within their service area.[125] Although Citizens' was in a prime position to benefit from spillover economic development triggered by the Mercedes plant, Citizens' and the City of Vance, which relies on Citizens' for water, have seen very little change in their neighborhoods as most development has occurred closer to Tuscaloosa.[126] Without new physical development inside the city limits, the City of Vance continues to bear some of the region's growing pains without participating in the economic gains.[127] For example, the nearby Vance Elementary School is terribly overcrowded and continues to use an overworked septic tank while the Mercedes plant has its own sewer lines.[128] In 2000, Mercedes broke ground on a $600 million expansion of the plant which will double the size of the plant and its production output.[129] The lesson of section 1926(b) and its effect on Vance is that economic-development gains can divide neighbors into winners and losers, even when the regional economy has improved overall.

The final development issue created by water suppliers is the need for water services for fire protection, which is required by many cities, but not by section 1926(b). Starting with the first reported section 1926(b)

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123. Donald L. Barlett & James B. Steele, *Special Report: Corporate Welfare*, TIME, Nov. 9, 1998, at 36, 50 ("Mercedes received a package of incentives that totaled $253 million in value. For example, Alabama acquired and developed the plant site in Vance for $60 million. It used National Guard troops to clear the land and spent $77.5 million on utility improvements and roads.").

124. *Id.*

125. *See* Ball, *supra* note 77.

126. The Tuscaloosa County Industrial Development Authority had located a site within Citizens' service area for an industrial park that would have housed two of Mercedes's suppliers, Johnson Controls and Delphi Packard Electronics. Negotiations with Citizens' in 1994 did not work out, and the industrial park was built farther away in the service area of the Coaling Water Authority. Telephone Interview with Alan Harper, Project Manager, Tuscaloosa County Industrial Development Authority (Feb. 8, 2001). In 2000, the two sides were unable to reach an agreement on a different site because Citizens' opposed the introduction of water and sewers from an outside supplier. *Id.*; *see also* Buster Kantrow & David Milstead, *Auto Towns: Towns Learn Hard Lessons About Impact of Auto Plants*, WALL ST. J., Sept. 13, 2000, 2000 WL-WSJ 26609466 (noting that Vance is still without a grocery store, pharmacy, or stand-alone restaurant).

127. *See* Kyle Parks et al., *Southeast Sustains Sizzling Success*, NAT'L REAL EST. INVESTOR, Sept. 30, 2000, 2000 WL 13034773 (reporting that Mercedes was a huge success for Birmingham, whose future "remains bright"). *But see* Barlett & Steele, *supra* note 123 (noting school overcrowding and poor conditions in Vance).

128. *See id.* Vance recently used bonds to fund the construction of its own sewer system in 2000. *See* Kantrow & Milstead, *supra* note 126.

129. *Mercedes-Benz Breaks Ground on $600 Million Expansion*, BIRMINGHAM BUS. J., Nov. 17, 2000, 2000 WL 17294710.

decision,[130] federal courts have ruled that municipal regulations for fire protection do not apply to indebted water districts.[131] The irony is that property owners who receive water from the district must have fire protection if their property is within the municipality's jurisdiction. Cities can annex properties within the service area of a protected district without violating section 1926(b) as long as the district's facilities and customers remain with the district.[132] In this situation, the city retains the right to provide fire protection in the district's service area.[133] However, cities in Texas that currently provide fire protection have little incentive to annex properties served by a section 1926(b) water provider because state law requires every city to provide the same level of service to annexed properties.[134] Consequently, the annexing city would be forced to bear the additional expense of providing separate water lines for fire hydrants because the water district would retain the right of water service with an exemption from fire protection because of section 1926(b).[135]

A different problem is created for properties located in a city's extraterritorial jurisdiction (ETJ), which is outside the corporate boundaries but exists as an area of influence immediately adjacent to the city.[136] Once property is included in the ETJ, the municipality's development rules become applicable.[137] Properties in the ETJ with water service from a protected

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130. Rural Water Dist. #3 v. Owasso Util. Auth., 530 F. Supp. 818, 823 (N.D. Okla. 1979) (noting that 7 U.S.C. § 1926(b) was enacted to provide safe and adequate household water, not fire protection).

131. *See* Rural Water Sys. No. 1 v. City of Sioux Center, 29 F. Supp. 2d 975, 994 (N.D. Iowa 1998) ("If a municipality could displace a rural water system simply by annexing territory and declaring that the rural water system did not then meet some City standard for service in the annexed area, the protection of § 1926(b) would be illusory...."); *see also* N. Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F. Supp. 15, 23 (E.D. Ky. 1992) ("The adequacy of the water service North Shelby is presently able to provide, including fire protection, is irrelevant to a determination whether North Shelby is entitled to the protections of § 1926(b).").

132. *See* Water Works Dist. No. II v. City of Hammond, 1989 WL 117849, *5 (E.D. La. 1989) (finding the city had violated § 1926(b) and enjoining the city from providing service but allowing its water lines to be used for fire-protection purposes).

133. *See* Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1216 (10th Cir. 1988).

134. TEX. LOC. GOV'T CODE ANN. § 43.056(a) (Vernon Supp. 2001) ("[T]he municipality proposing the annexation shall complete a service plan that provides for the extension of full municipal services to the area to be annexed... by any of the methods by which it extends the services to any other area of the municipality.").

135. Should the city construct lines exclusively for fire hydrants, the city will have no chance to recover its construction costs.

136. *See* TEX. LOC. GOV'T CODE ANN. §§ 42.001-.904 (Vernon 1999 & Supp. 2001) (establishing extraterritorial jurisdiction for Texas cities).

137. *See* TEX. LOC. GOV'T CODE ANN. § 212.003 (Vernon 1999); *see also* Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 289-92 (1992) (suggesting that adoption of extraterritorial rules by states can eliminate conflicts over municipal annexation); *see generally* 3 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 20.01 (1991) (providing a general discussion of extraterritorial jurisdiction laws in several states).

water provider without fire hydrants become noncompliant once they are within the scope of city ordinances.[138] As a result, undeveloped properties inside the water association and the municipality's ETJ are likely to remain undeveloped because neither the district, nor the city, nor the developer are likely to construct a separate line for hydrants without an easy connection to the district or municipal system.[139]

The Kansas Federal District Court ignored the fire-protection issue in *Rural Water District No. 1 v. City of Ellsworth*.[140] Ellsworth County decided to construct a new hospital using water service from the City although the property was outside the city limits and in the service area of the plaintiff district, which was protected by section 1926(b). Although the district did not have a water line on site, it did have lines nearby, and the court concluded that it had the physical capacity to make service available.[141] The court made its conclusion despite finding that the plaintiff district could not comply with code requirements to provide outdoor fire hydrants.[142] The court granted a preliminary injunction in favor of the district, and the City was prohibited from competing with the district for domestic water service,[143] effectively requiring the City of Ellsworth and the county to provide a water line exclusively for fire hydrants if the hospital were to be built.

In summary, section 1926(b) can harm municipalities and local development in several ways, depending on the attitude of the protected water supplier. A protected supplier can request that the municipality pay for the right to serve an undeveloped site because it holds a legal entitlement to serve the property under state law or county ordinances. The municipality may have to pay twice to serve the tract: the price charged by the district—a price that may reflect a percentage of the revenue gained by the city from water use on the property—and the cost necessary to build the infrastructure.

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138. Under this scenario, Texas law would also prevent the water association, as the CCN holder, from providing new water service altogether if the property does not comply with municipal platting requirements. TEX. WATER CODE ANN. § 13.2501 (Vernon 2000) (citing TEX. LOC. GOV'T CODE ANN. §§ 212.012, 232.0047). The irony is that municipal platting requirements may demand fire protection.

139. The city of Belton, Texas has experienced this problem, and the conflict has prevented new residential development in the ETJ. The nearby WSC refuses to allow fire hydrants to connect to its system. Letter from Jeff Holberg, City Manager, City of Belton, Texas, to Monte Akers, Director of Legal Services, Texas Municipal League (May 31, 2000) (on file with the Texas Law Review).

140. 995 F. Supp. 1164 (D. Kan. 1997).

141. *Id.* at 1169. The court also recognized that the federal duty to serve under 7 C.F.R. § 1942.17(n)(2)(vii) was the legal equivalent of making service available. *Id.* (following N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 916 (5th Cir. 1994)). A later decision from the Tenth Circuit rejected this nexus. *See supra* note 56.

142. *City of Ellsworth*,.995 F. Supp. at 1167 & n.2 (finding that the district's inability to provide external fire protection did not affect its § 1926(b) protection).

143. *Id.* at 1170.

On the other hand, if no deal can be made, the property may remain undeveloped if the prospective purchaser invests elsewhere because of distrust of the water district's ability to supply water for the project. The Ellsworth County hospital serves as a worst-case scenario for how section 1926(b) can harm a city. Without a negotiated agreement, section 1926(b) allowed the water district to win in court; yet the county, as the developer of the hospital, could not walk away from the project, even when the district could not meet the code requirement of the city. Although it built water lines near the site, the city will not receive any revenue from the hospital, yet will likely be forced to provide connections for fire hydrants.

V. Related Economic-Development Issues: The Provision of Water Service and Urban Sprawl

The pragmatic defense for section 1926(b) is that areas where associations have received loans should have the power to remain rural or develop with low population densities. In areas that stay rural because of section 1926(b), local residents may consider the law to be a blessing since they can preserve their lifestyle and prevent additional development. Viewed in this light, section 1926(b) empowers unincorporated areas in the fight against urban sprawl, generally considered detrimental to communities,[144] by making their service areas off-limits to expanding cities. Texas cities have complained that water providers, and possibly their customers, desire to have urban benefits without city hassles.[145] Thus, the question becomes whether a water association can justifiably lock in a rural water system of limited capacity to prevent suburban development within its service area.

The idea that a utility district could intentionally underdevelop its water facilities to impede future growth was affirmed by a California court that held a municipal water district could be formed to control growth.[146] The ruling prevented two farmers from excluding their properties from the new municipal water district and buying water from another district. It was undisputed at trial that the new district had no intention to sell water even when the current supply for agricultural uses was inadequate. The district's constituents had overwhelmingly supported the no-water policy in order to prevent suburbanization.[147] However, subsequent decisions in California

144. *See infra* note 157.

145. Letter from Frank Salvato, City Manager, City of Taylor, Texas, to Monte Akers, Director of Legal Services, Texas Municipal League (June 19, 2000) (on file with the Texas Law Review).

146. Wilson v. Hidden Valley Mun. Water Dist., 63 Cal. Rptr. 889 (Ct. App. 1967). The decision by the residents of Hidden Valley to form a district prevented the areas from being included in another district that would have imported water into rural Ventura County.

147. The court was swayed by the popularity of the decision, noting that "[t]he people of Hiddeu Valley are using this local public entity to control and determine for themselves their own water future... negatively instead of positively. By the exercise of their right of political self-determination, they [can]... regulate the kind of land use that can prevail within the Valley." *Id.* at 898 (citation omitted).

have found that municipal water districts are under a statutory duty to augment their water supplies during a moratorium on new hookups.[148] Thus, a water district may be able to control growth, but not to use a moratorium to mask a no-growth policy.[149] Furthermore, in areas where multiple bodies influence urban development, water districts should not become the dominating influence.[150]

The suggestion here is that unincorporated areas that receive water from a protected water association should not rely on section 1926(b) to impede or prevent suburban development. By incorporating, a town can use broader land use controls through a political process that shows greater accountability for popular demands.[151] In reference to the issue of farmland preservation, agricultural zoning is a valid option for cities to prevent urban sprawl without requiring the voluntary participation of farmers.[152] Incorporation does not eliminate future eligibility for RUS water facility grants and loans, as long as the town is under 10,000 residents.[153] Earlier, it was shown that municipal water systems have certain administrative and financial advantages over private systems.[154] For potential land developers, incorporation also provides the jurisdictional and procedural clarity that is lacking in private water associations.

Two other reasons exist why a rural water association should not have the final say about whether its service area has the right to retain its rural,

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148. *See* Bldg. Indus. Ass'n of N. Cal. v. Marin Mun. Water Dist., 1 Cal. Rptr. 2d 625 (Ct. App. 1991); Swanson v. Marin Mun. Water Dist., 128 Cal. Rptr. 485 (Ct. App. 1976).

149. *See* Herman, *supra* note 58, at 444-47 (distinguishing *Hidden Valley* as acceptable because of its open political decision by the only representative body in the area, while *Swanson* involved a technical response to a water shortage which circumvented political channels). *See also* Biggs, *supra* note 86, at 300-02 (finding that any water utility can limit new service connections for technical reasons relating to capacity, but municipalities can use their police powers to control growth as a policy decision).

150. *Swanson* involved one water district where "numerous government agencies [were] charge[d] with regulating development . . . in the San Francisco Bay Area. . . . [I]n that context, a water board should not wield undue influence over land use planning decisions, because residents seeking to control or limit growth have other avenues . . . ." Herman, *supra* note 58, at 447.

151. The Supreme Court has ruled that limited-purpose special districts, such as water districts, can limit their electorate to property owners using a weighted scale. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728-29 (1973) (characterizing the defendant district as limited because the district managed water for farming only and did not serve the broader purposes of a general municipal government). For criticism of the *Salyer* exception to the one-person, one-vote rule, see Glenn P. Smith, Note, *Interest Exceptions to One-Resident, One-Vote: Better Results from the Voting Rights Act?*, 74 TEXAS L. REV. 1153, 1159-64 (1996).

152. *See* Cordes, *supra* note 4, at 1051-69 (defending the constitutionality of agricultural zoning as a means to place public restrictions on farmland to preserve its agricultural use). In considering the direct link between farmland preservation and § 1926(b), it should be noted that farm preservation or rural lifestyles were never cited in the legislative history. *See supra* text accompanying notes 12-17. None of the § 1926(b) cases involved an operating farm where the "service provided or made available" was in dispute.

153. Eligible projects must serve a "rural area," which is defined as "any area not in a city or town with a population in excess of 10,000 inhabitants." 7 C.F.R. § 1780.3(a) (2000).

154. *See supra* text accompanying notes 87-91.

low-density land use pattern. First, the rural water monopoly effectively prevents a market solution because more intense use of the land in the urban fringe cannot be achieved and the individual property owner bears the loss.[155] Second, property owners along the urban fringe may not easily identify with the urban or rural community in question, and they should determine development issues for themselves.[156]

From a different perspective, the economic losses created by section 1926(b) could be considered worthwhile simply because they stifle urban sprawl, which many consider the greater evil.[157] Rural and agricultural lands are "consumed" by sprawl as cities, supported by their utilities, replace farms with strip malls and small-lot homes.[158] But those that advocate discretion in the government extension of utilities would argue that it is municipalities that should use their powers to control the timing and location of new development.[159] Whether municipalities use such discretion wisely or in

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155. This reason is analogous to traditional arguments against zoning and other land use controls that embody different political and societal interests over pure market forces in the use of land. *See* Fennell, *supra* note 112, at 25 & n.92 (noting that zoning regulations often diverge from consumer demand and market forces in terms of land use); *see also id.* at 7 n.22 (citing sources proposing alternatives to zoning designed to foster market influences in land use).

156. For the property owner trapped inside the service area of a § 1926(b) water supplier, it is clear that self-determination of water service, a critical component of property development, is nonexistent. This situation is reversed for property owners on the urban fringe that could be included in the nearby municipality through annexation. Many states require consent of the property owners as a condition of municipal annexation. *See* Reynolds, *supra* note 137, at 260-61 ("[M]ost states impose an overlay of self-determination on all [annexation] proceedings.... [C]onsent of those to be annexed is frequently an absolute prerequisite to annexation."). Likewise, municipalities cannot use sewer service as leverage for obtaining consent for annexation of nonresidents seeking such service. *See* Hussey v. City of Portland, 64 F.3d 1260, 1265-66 (9th Cir. 1996) (finding that tying the sewer subsidy to consent subverted the voting process otherwise required for annexation). This remains true when the municipality is federally indebted and protected by § 1926(b). *See supra* note 17.

157. The following quote shows the antipathy of one author towards sprawl:

> The process of destruction... is so poorly understood that there are few words to even describe it. Suburbia. Sprawl. Overdevelopment.... Much of it occupies what was until recently rural land—destroying, incidentally, such age-old social arrangements as the distinction between city life and country life.... [I]t is a landscape of scary places, the geography of nowhere, that has simply ceased to be a credible human habitat.

JAMES H. KUNSTLER, THE GEOGRAPHY OF NOWHERE 15 (1993). Generally speaking, sprawl creates higher operating costs for public utilities, higher transportation costs for residents, and excessive consumption of agricultural and environmentally sensitive lands. Sprawl has also been linked to the deterioration of the quality of life, social exclusion, and the mismatch between the locations for jobs and housing. *See* Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 801, 802-03 (1999).

158. *See* Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 141 (1999) (observing that urban sprawl consumes peripheral agricultural land because it is often the cheapest land available).

159. *See* Biggs, *supra* note 86, at 304 (advocating the use of a city's police power outside its boundaries, even if development is delayed). The claim for municipal discretion in refusing utility extension is as follows:

blind acceptance of any and all development is beyond the scope of this Note.[160] The argument is that if the power to manipulate development through water policy can vest in an urban area, it should be for the municipality to decide where growth, if any, should occur. Unfortunately, in those fringe areas where prospective water service could come from a protected water association or a municipality, section 1926(b) automatically gives that power to a water association.

In the bigger picture, solutions to sprawl exist outside the question of who, if anyone, will supply water to properties on the urban fringe. Instead of looking at sprawl as a matter of sheer land consumption, a more realistic definition of urban sprawl illustrates that sprawl is a product of unrelated land development.[161] If protected associations are essentially pockets of land immune from sprawl, then the orderly development of land, whether through government policies of sprawl or through growth management, cannot occur. When all other forces support sprawl in the general area of the protected water association, land consumption will simply be redirected to nearby unprotected areas, creating leapfrog development.[162] The most costly and inefficient type of sprawl is "skipped-over, low-density residential and non-residential development,"[163] a characterization that could easily apply to rural or exurban areas, particularly those with underdeveloped water systems. When such underdeveloped systems are legally untouchable, the orderly assimilation of undeveloped land cannot occur.

Suggested solutions to urban sprawl are tied to municipal growth management,[164] space management,[165] and the development of regional

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> It [the power to refuse to extend utility service] is an important tool for controlling the location and timing of development in a rational, coherent, and efficient fashion .... [T]he principle alternative is to leave the shape of future growth to the self-interest of real estate developers ... [which] rarely if ever coincides with important interests of a community .... Local government, on the other hand, has the breadth of knowledge about the community that enables it to make utility extension decisions that are consistent with community land use policy.

Ramsay, *supra* note 58, at 962.

160. Many suburbs support sprawl by promoting large-lot development over more intense development that would consume less land; large-lot developments are often not tied to municipal water systems because the lots use water wells and are large enough for septic tanks. *See* Porter, *supra* note 1, at 712-15.

161. Florida has passed legislation identifying sprawl as the result of premature and poorly planned conversion of rural land and development that does not relate to adjacent land uses or does not make maximum use of existing public facilities. Mandelker, *supra* note 157, at 802 (citing FLA. ADMIN. CODE ANN. r. 9J-5.003(134) (1999)).

162. Leapfrog development is characterized as sprawl at its worst. *See* Burchell & Shad, *supra* note 157, at 140-42 (defining sprawl development as "low-density residential and nonresidential intrusions into rural and undeveloped areas, and with less certainty as leapfrog, segregated and land-consuming in its typical form").

163. *Id.* at 147 (citing studies by the Center for Urban Policy Research at Rutgers University and the Institute of Urban and Regional Development at the University of California, Berkeley).

164. Municipalities using growth management seek to "influence the location, amount, type, timing, quality, and/or cost of development in accordance with public goals." EDWARD J. KAISER

planning organizations where multiple jurisdictional entities collectively decide land use policy.[166] Whether protected rural water associations would desire to participate in regional growth management is doubtful,[167] and water associations protected by section 1926(b) could be exempt from any water-service regulations promulgated by state-created regional organizations.

VI. Possible Solutions

Earlier parts of this Note have shown that the protection given by section 1926(b) bestows monopoly status on rural water associations that are indebted to the federal government. The resulting inefficiencies are manifest in a loss of economic development to neighboring municipalities and to properties trapped within the service area. The solution to this problem can take one of two forms: a complete repeal of section 1926(b) or a combination of legislative amendments, judicial reinterpretations, and administrative changes by the Rural Utility Service (RUS) to limit the scope of protection from its current broad base.

A. Repeal

A legislative repeal of section 1926(b) would essentially reverse all of the prior decisions described in this Note that ruled in favor of the indebted water association. A repeal would eliminate all the harms related to economic development described in Part IV because rural water monopolies would not be able to lock in properties that desire municipal water service. In many situations involving new development, a repeal of section 1926(b) would allow a developer to seek the best deal in establishing water service when a municipality or a nonprofit water association could feasibly serve the property. Under this situation, land development can move forward and contribute to economic development.

Given the problems of many private rural water systems, open competition to provide water for unserved tracts may hurt the prospects of many rural systems. But existing federal protection should not be read to ensure future customers. Logically, it is only the loss of existing customers that would impair the association's ability to repay its loans and keep per-

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ET AL., URBAN LAND USE PLANNING 14 (4th ed. 1995) (citation omitted). Growth management tools include "impact fees, urban limit lines, design guidelines, development agreements, capital improvements programs, and adequate public facility ordinances—as well as traditional zoning and subdivision controls." *Id.* at 15.

165. *See* Mandelker, *supra* note 157, at 826-28 (explaining that space management encourages high-density development in one area while limiting development in other areas).

166. *See* Porter, *supra* note 1, at 729-33 (proposing a system for metropolitan growth management through regional intergovernmental organizations created by states and noting that such organizations could regulate the provision of municipal services and infrastructure).

167. *See id.* at 717-18 (stating that the greatest opposition to regional strategies is the reluctance of cities and special districts to join such efforts when their independence would be compromised).

user costs low—the two pillars of legislative intent behind section 1926(b).[168] If section 1926(b) were repealed, supporters might contend that municipalities would be unchecked in their ability to condemn the association's facilities. A repeal of section 1926(b) would damage water associations if the municipality successfully took the association's existing customers. In *City of Madison v. Bear Creek Water Ass'n*,[169] the condemnation proceeding proposed by the City of Madison would have included 40% of the water association's customers and 60% of its total facilities. Absent section 1926(b), the success of cities in eminent-domain proceedings against water associations might suggest dire consequences in similar circumstances.

On the other hand, the existence of state regulations applicable to all water suppliers can protect suppliers and determine appropriate service areas. For example, the Bear Creek Water Association had received its CCN in 1971 from the Mississippi Public Utility Commission for its service area, and the City of Madison had given its consent as required by state law.[170] In 1985, along with the eminent-domain proceedings against Bear Creek, the City attempted to change the CCN to reflect its proposal. But the FmHA intervened in the state suit, and the case was removed to federal court.[171] If section 1926(b) did not exist, there is no suggestion that the City would have been able to unilaterally change Bear Creek's CCN through the state's public-utility commission.[172] Therefore, the Fifth Circuit's fear that cities would "skim the cream" from water associations[173] was misplaced, given that state administrative procedures would likely block haphazard actions by cities to take those existing customers.

North Alamo Water Supply Corp. v. City of San Juan[174] represents the other side of *Bear Creek* and shows the negative implications of using section 1926(b) to preempt state water regulations.[175] Under the facts of that

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168. *See supra* Part II. At least one court has ruled that future customers would help the district and should be considered as a part of the § 1926(b) scope of protection. *See* N. Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F. Supp. 15, 22 (E.D. Ky. 1992). Also see *supra* text accompanying notes 42-43 for more information on the case.

169. 816 F.2d 1057, 1058 (5th Cir. 1987). Also see *supra* text aecompanying notes 27-30 for further discussion of the case.

170. *See Bear Creek*, 816 F.2d at 1058.

171. *Id.*

172. *See* MISS. CODE ANN. § 77-3-23 (2000) (providing a "procedure for sale, assignment, lease or transfer of certificate").

173. *Bear Creek*, 816 F.2d at 1060.

174. 90 F.3d 910 (5th Cir. 1996). See also *supra* text accompanying notes 44-50 for further discussion of the case.

175. Although *North Alamo* did not directly discuss preemption, the holding shows that Texas was denied access to its own administrative procedures in resolving the dispute between North Alamo WSC and the City of San Juan. *See supra* text accompanying notes 51-52. Other courts have been more explicit that § 1926(b) preempts state law. *See* City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81, 87 (Colo. 1995) (holding that § 1926(b) "expressly preempts state law governing the authority of a public entity to provide domestic water service"). *See generally*

case, North Alamo was not serving the disputed tracts inside its CCN. When the City of San Juan went to the Texas Natural Resources Conservation Commission (TNRCC) in an attempt to decertify that portion of North Alamo's CCN, the district court permanently enjoined the City from pursuing the application before the state agency.[176] Again, the absence of section 1926(b) would not have guaranteed victory for the municipality before the state agency because the City had arguably violated the Texas CCN law.[177] On the other hand, TNRCC may have ruled to decertify the area, given North Alamo's physical inability to serve the disputed area.[178] The legal precedent of *North Alamo* would likely preclude the state from revoking the CCN if the water provided by the federally indebted water association did not meet state or federal drinking-water standards.[179] Therefore, the repeal of section 1926(b) would remove an impediment to the functioning of the CCN administrative system used in a vast majority of states.

B. Legislative and Administrative Options Other Than Repeal of Section 1926(b)

Should political opposition prevent a complete repeal of section 1926(b),[180] a middle ground could be found through amending the federal statute and creating administrative options to deal with future conflicts between municipalities and other water suppliers.

Any amendment of section 1926(b) could retain the protection from municipal curtailment for service provided by water corporations to their existing customers, but eliminate protection for areas that are currently unserved or receiving inadequate service. This amendment could potentially override the second category of section 1926(b) cases that viewed the association's service area as a matter of law, either through the existence of a

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Roger Colton, *Arguing Against Utilities' Claim of Federal Preemption of Customer-Service Regulations*, 29 CLEARINGHOUSE REV. 793 (1995) (giving an overview of responses and analyses to be employed by advocates resisting federal preemption).

176. *N. Alamo*, 90 F.3d at 913-14.

177. *See* TEX. WATER CODE ANN. § 13.252 (Vernon 2000) ("If a retail public utility... extends retail water or sewer utility service to any portion of the service area of another retail public utility that has... a certificate of public convenience and necessity, [TNRCC] may issue an order prohibiting the... provision of service....").

178. *See id.* § 13.254(a)(1) (stating that TNRCC "may revoke or amend any certificate of public convenience and necessity... if it finds that... the certificate holder has never provided, is no longer providing, or has failed to provide continuous and adequate service in the area").

179. Brief of Amicus Curiae Texas Municipal League at 10, N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996) (No. 95-40048) (arguing that state enforcement of programs created under the federal Safe Drinking Water Act would be frustrated because § 1926(b) suppliers would not be subject to state enforcement actions to decertify noncomplying systems).

180. Perhaps the greatest source of support for the continued existence of § 1926(b) is the National Rural Water Association. For their policy views regarding § 1926(b), see http://www.ruralwater.org (last visited Oct. 12, 2001).

state-defined legal duty or the mere existence of nearby facilities—the pipe-in-the-ground test. Amending section 1926(b) to focus on existing customers instead of service "provided or made available" would allow courts to look at factual questions to determine whether the municipal actions would impede an association's ability to repay its debt. Because the enabling statute, 7 U.S.C. § 1926, does not define "service area" or "service provided or made available,"[181] it is inappropriate to extend the protection of section 1926(b) beyond the definition contained in the federal regulations, when the definition of service area is based on the project,[182] not the provider.[183] Current federal regulations require an applicant for RUS loans to demonstrate that the water project will have capacity to serve the present population of the area.[184] RUS has rejected projects that were not feasible because an insufficient number of customers signed on at the time of application.[185] Therefore, amending section 1926(b) to employ a set statutory definition of service area, limited to the loan application, would eliminate the continued expansion of protection by the judiciary to areas that were originally outside the project. The protection provided by section 1926(b) should be consistent with the service area proposed at the time of the RUS application.

A different type of amendment would allow municipalities to pay for the ability to curtail protected service areas with the federal government administratively regulating such payments to ensure that the debt obligations of the nonprofit provider are reduced. One state court in Texas allowed a city to abolish an entire water district, using state statutory provisions, on the assumption and satisfaction of the district's indebtedness to the USDA.[186] It is a rare case when a city can condemn an entire district and simultaneously satisfy its federal debt, but the ruling suggests that partial condemnation can

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181. *See supra* Part II.

182. 7 C.F.R. § 1780.3(a) (2000) ("*Service area* means the area reasonably expected to be served by the project.").

183. In *Bell Arthur*, the Fourth Circuit rejected part of the analysis of the district court, which had limited the scope of § 1926(b) to the properties under a particular project with an outstanding loan. *See* Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517, 524 (4th Cir. 1999); *see also supra* text accompanying notes 77-83.

184. 7 C.F.R. § 1780.7(c)(2) (2000) ("Projects must be designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area to the extent practicable."); *see also id.* § 1780.11(a) (2000) ("The facilities will be installed so as to serve any potential user within the service area who desires service and can be feasibly and legally served.").

185. GAO, RURAL WATER PROJECTS: FEDERAL ASSISTANCE CRITERIA 8 (1998) (explaining the rejection of the application for Fall River Water Users District Rural Water Project (South Dakota) was because the sponsors were "unable to obtain a sufficient number of users to commit . . . for the system to be feasible").

186. Starr County Water Control & Improvement Dist. No. 2 v. Rio Grande City, 961 S.W.2d 607, 609 (Tex. App.—San Antonio 1997, pet. dism'd w.o.j.) (distinguishing prior federal § 1926(b) cases as based on preventing competition).

occur as long as the municipal payment to the indebted association can be earmarked for debt repayment.

Earlier, it was shown that some Texas municipalities have paid water associations to release areas from their CCN. Whether those monies were used to repay the district's debt obligations or to reduce the costs per customer is not a matter of existing state or federal law. New federal legislation could create administrative review of transfers or waivers of section 1926(b) protection as a federal entitlement to ensure that the money paid to the protected entity would be used in a manner consistent with the original legislative goals. RUS could calculate a price for a particular curtailment as proposed by the municipality. Instead of relying on friction-laden negotiations between a municipality and a rural water monopoly, both sides can attempt to persuade RUS as a neutral fact-finder what the proper price should be. The proper price would represent the loss of the disputed area to the protected association or district only in terms of debt repayment and system administration costs. Once a price is determined, the municipality can decide to pay or walk away.

Another set of changes in the lending procedures could prevent future disputes. Future loans could be geared to more remote rural areas to avoid future conflicts with growing urban areas. The RUS currently employs a selection process for loans and grants that scores applications using various criteria.[187] Additional criteria could be established so that possible conflicts with nearby nonrural areas[188] or metropolitan statistical areas would penalize the scoring of the application. The current RUS loan and grant program has more qualified applicants than available funds, with a three-year waiting list for eligible projects.[189] New loans should be prioritized by the likelihood of absence of municipal conflict because the RUS program inherently creates economic-development losses along the urban fringe. At a minimum, lending for projects should not be authorized when the proposed service area would include the extraterritorial jurisdiction of a nonapplicant municipality.

VII. Conclusion

Enacted forty years ago, the Consolidated Farmers Home Administration Act was adopted as part of the Agricultural Act of 1961 to increase lending for water facilities in rural areas. Until that time, the FmHA loaned exclusively to farmers. With the new law, the intended beneficiaries were rural residents who could form private water associations along with

187. *See* 7 C.F.R. § 1780.17 (2000).

188. The RUS loan and grant regulations define rural areas as areas "not in any city or town with a population in excess of 10,000 inhabitants." 7 C.F.R. § 1780.3(a) (2000).

189. NATIONAL RURAL WATER ASSOCIATION, RURAL WATER 2000 REPORT TO CONGRESS § 4, at 1 (2000) ("Hundreds of communities are currently on the long national waiting list for funding, which included a backlog of over $2 billion in eligible loans and over $1 billion in eligible grants.").

farmers to establish centralized water systems such as those commonly used in cities. To protect the ability of the recipients to repay the loans, the provision codified at 7 U.S.C. § 1926(b) prevented competition from outside entities by making the areas served by the association off-limits to annexation by neighboring cities. Forty years later, the vagueness of section 1926(b) has led the federal judiciary to take the mandate of protection to the extreme.

Beyond annexation, any action by a municipality that could possibly deprive the protected association of customers is a violation of section 1926(b). This may be acceptable when a city is attempting to condemn the existing facilities of an association. But the association's customers, including those who are residents of a city, are left with no alternative when the association provides inadequate service. Any city that contracts with a protected supplier for water service is automatically locked in, and courts will invalidate any attempt to switch suppliers or find a supplementary source. More dangerous is the idea that a protected association can have its protection include future areas of development when its original project did not include those properties or customers. State law, notably the creation of geographical service areas for holders of Certificates of Convenience and Necessity, has become a bridge for the federal judiciary to enlarge the scope of protection to include undeveloped tracts.

When a rural water association's area of protection is larger than its actual water system, the area is unlikely to be developed because many rural systems are incapable of handling large-scale projects, such as small-lot residential subdivisions and most commercial and industrial activities. It is these types of developments that occur all along the urban fringe, and they will continue to occur as urbanization pushes outward into areas that were considered rural and isolated decades ago. Unless a nearby municipality can extend its water service to the tract, the developer will move elsewhere. Because of section 1926(b), the municipality must negotiate for the right to serve the tract—a daunting task when the association has an absolute right that is essentially unregulated. The experience of many Texas cities shows that negotiating has been difficult and that water supply corporations have charged monopoly prices for legal entitlements instead of water infrastructure. Cities in Texas have also felt the pain of economic-development losses when potential investments do not occur because the developer cannot access municipal water service. With section 1926(b), protected rural water associations have the power to make crucial decisions about the form of urban development along the fringe. Without deals arranged by the water association, rural areas can become underdeveloped pockets of land surrounded by urban land uses. For opponents of urban sprawl, such mismanaged land development can only make the costs of urban sprawl worse.

Demographic trends suggest that the suburban population of the United States will increase in the early part of the twenty-first century, a trend that

also suggests that urban sprawl will continue its growth beyond the limits of today's suburbs.[190] The number of sprawl-induced confrontations between cities and rural water associations can only increase as rural districts and water-supply corporations that receive loans today could find themselves very close to urban areas before the end of the loan's forty-year term. As of 2001, reported cases involving section 1926(b) have come from sixteen states and six different courts of appeals.[191] Thus, it is a fair assumption that the experience of Texas cities is being felt nationwide.

A repeal or amendment of section 1926(b), however, does not require a political sacrifice of water associations and special water districts. The same state mechanisms that were hijacked by the Fifth Circuit in *North Alamo* are intended to create individual water-service areas for a public or a private water provider as long as access and quality are assured to all properties in the area. Repeal of section 1926(b) would allow state administrative agencies to establish or amend the water-service areas based on objective criteria. This would eliminate the ability of certain protected providers from exercising monopoly control over areas they do not supply with water, yet it would not compromise the original congressional intent that such water associations should enjoy protection of their existing facilities and customers.

—Scott Hounsel

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190. *See* Burchell & Shad, *supra* note 158, at 139 ("[T]here will continue to be skipped over development in rural and undeveloped areas. It would be totally unrealistic to expect a moderate share of growth to occur solely in already built-up neighborhoods in cities or in close-by, inner suburbs.").

191. The following states have reported cases with § 1926(b) claims (arranged alphabetically): Alabama, *see* City of Wetumpka v. Cent. Elmore Water Auth., 703 So. 2d 907 (Ala. 1997); Colorado, *see* City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995); Indiana, *see* Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 (7th Cir. 1989); Iowa, *see* Rural Water Sys. No. 1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997); Kansas, *see* Rural Water Dist. No. 1 v. City of Wilson, 29 F. Supp. 2d 1238 (D. Kan. 1998); Kentucky, *see* Lexington-S. Elkhorn Water Dist. v. City of Wilmore, 93 F.3d 230 (6th Cir. 1996); Louisiana, *see* Water Works Dist. No. II v. City of Hammond, 1989 WL 117849 (E.D. La. 1989); Maine, *see* Cumberland Vill. Hous. Assocs. v. Inhabitants of Cumberland, 609 F. Supp. 1481 (D. Me. 1985); Mississippi, *see* City of Madison v. Bear Creek Water Ass'n, 816 F.2d 1057 (5th Cir. 1987); Missouri, *see* Public Water Supply Dist. No. 1 v. City of Poplar Bluff, 12 S.W.3d 741 (Mo. Ct. App. 1999); New Mexico, *see* Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass'n, 125 F. Supp. 2d 1304 (D.N.M. 2000); North Carolina, *see* Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517 (4th Cir. 1999); Ohio, *see* Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 916 F. Supp. 692 (S.D. Ohio 1995); Oklahoma, *see* Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192 (10th Cir. 1999); South Carolina, *see* James Island Pub. Serv. Dist. v. City of Charleston, 249 F.3d 323 (4th Cir. 2001); Texas, *see* N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996).

A number of U.S. courts of appeals cases have involved § 1926(b) claims. *See, e.g.*, James Island Pub. Serv. Dist. v. City of Charleston, 249 F.3d 323 (4th Cir. 2001); Rural Water Dist. No. 1 v. City of Wilson, 243 F.3d 1263 (10th Cir. 2001); Adams County Reg'l Water Dist. v. Village of Manchester, 226 F.3d 513 (6th Cir. 2000); Rural Water Sys. #1 v. City of Sioux Center, 202 F.3d 1035 (8th Cir. 2000); N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996); Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 (7th Cir. 1989).